IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0402

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT HOUGHTON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

APPEARANCES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Appellant Robert Houghton (Houghton) replies to Appellee's brief as follows.

Houghton accepts the State's agreement that the 200-day trigger was met in this case. (Appellee's Br. at 18; *see also*, Appellant's Br. at 8-10.)

Houghton disagrees with the State's argument that the district court correctly weighed Factor Two in favor of the State. (Appellee's Br. at 10-13, 40.) As argued in his opening brief, the 520 days of delay were caused by the State. On March 9, 2007, Houghton's wife, T.H., reported to authorities Houghton had inappropriately touched his stepdaughter and her friend. On March 10, 2007, the girls were interviewed by McManis. After the interview, McManis went to Houghton's residence to arrest Houghton. Houghton had no knowledge the girls would be interviewed the day after he left. It is possible Houghton left his house that night so that he would not be near his wife and stepdaughter because of the situation.

Houghton can barely be said to have absconded if he did not know the level to which the authorities were involved and a warrant had been issued for his arrest. Houghton did not know the police were involved and when he learned of a warrant for his arrest he returned to Montana and turned himself in. (1/15/09 Tr. at 8-9.)

After turning himself in and his initial appearance, the district court failed to set a first trial date for almost eight months (December 17, 2007 to July 30, 2008).

The first trial date ever set was set for January 21, 2009. The State would like to blame Houghton for the late setting of this trial date, however, it was not Houghton's responsibility to set a trial date.

The State asserts Houghton has changed his legal theory on appeal by arguing that the delay was caused by the State and district court's failure to set an earlier trial date. (Appellee's Br. at 25.) However, this is not a new (or changed) legal theory on appeal, but a logical extension of the arguments made at district court. Houghton requested extensions of the omnibus hearing because the State failed to produce requested discovery. If the State had timely produced the requested discovery, the omnibus form would have been completed in a timely manner and a trial date would have been set. This was not the situation and therefore Houghton's argument stands. (Appellant's Br. at 11-13.)

Houghton stands on his arguments regarding Factor Three: The Accused's Responses to the Delay and Factor Four: Prejudice to the Accused, asserted in his opening brief. (Appellant's Br. at 14-18.) When the district court weighed the third factor against Houghton it erred in assuming it was Houghton's responsibility to bring himself to trial. (D.C. Doc. 69 at 10-11, Houghton "and his counsel made no earlier request or evidenced persistence in seeking to have the trial set at an earlier date.") It is not a defendant's responsibility to prosecute himself. *State v. Ariegwe*, 2007 MT 204, ¶ 72, 338 Mont. 442, 167 P.3d 815; *Barker v. Wingo*, 407

U.S. 514, 527, 529 (1972); accord *State v. Blair*, 2004 MT 356, ¶ 23, 324 Mont. 444, 103 P.3d 538.

Regarding Factor Three and reasons for the delay, Houghton again directs the Court to Justice Nelson's special concurrence in *State v. Rose*, 2009 MT 4, 348 Mont. 291, 202 P.3d 749:

> In this connection, it is necessary to recall the basic principles which dictate our approach under Factor Two. For one, "the primary burden' to assure that cases are brought to trial is 'on the courts and the prosecutor.'" [ ] "A defendant has no duty to bring himself to trial; the State has that duty." [ ] Moreover, "society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." [ ] Thus, the Supreme Court has repeatedly held that the prosecutor and the trial court have an affirmative constitutional obligation to try the defendant in a timely manner and that this duty requires a good faith, diligent effort to bring him to trial quickly. [ ] Consistent with these principles, the prosecution bears the burden of explaining pretrial delays.

Rose, ¶ 130 (*Ariegwe*, ¶¶ 64-65, 72; other internal citations omitted). As previously discussed, it is the State's obligation and the district court's obligation to bring the case to trial. The defendant does not have that burden. Hence, any delay in setting a trial date should be attributable to the State. Why should it be the defendant's fault (and that is what the State is saying) if Houghton requested several omnibus extensions because he still required discovery from the State? It is the State's obligation to provide discovery and that did not happen here. The State's failure to provide discovery should not be held against Houghton and his request for omnibus extensions. There were at least eleven months where no trial

date was set at all. The fact remains: 520 days elapsed between the filing of the Information and the trial. The case of *Ariegwe* did not contemplate this.

It should be noted criminal investigator Rick West (West) was not a *private* investigator, but is employed by the Office of the Public Defender as a criminal investigator. (Appellant's Br. at 4.) In its brief, the State alludes, several times, that West was a private investigator, and this is false and misleading. (Appellee's Br. at 37, 39-40.) The State asserts Houghton's pretrial incarceration was not oppressive and did not prejudice his defense because "he had a private investigator and counsel working on his behalf to gather evidence, contact witnesses and prepare his defense." Neither counsel, nor the investigator, were private. They were either full-time employees of the Office of State Public Defender or contracted to perform public defense work.

As Houghton argued in his opening brief, when balancing the four factors, they weigh in his favor. (*See* Appellant's Br. at 18-19.) The district court erred when it concluded that Houghton was not denied his constitutional right to a speedy trial. The district court's order denying Houghton's motion to dismiss this matter for lack of speedy trial should be reversed and the charges dismissed for the violation of Houghton's constitutional right to a speedy trial.

Respectfully submitted this _____ day of April, 2010.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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JOSLYN HUNT